

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6130

In The
United States Court of Appeals

For the Second Circuit

UNITED STATES POSTAL SERVICE,

Plaintiff,

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,
Proposed Intervenor-Plaintiff-Appellant,

vs.

PATRICIA H. BRENNAN, J. PAUL BRENNAN d/b/a
P.H. BRENNAN HAND DELIVERY,

Defendants-Appellees.

Appeal From An Order of The United States District Court
for the Western District of New York

BRIEF FOR DEFENDANTS-APPELLEES
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d/b/a P.H. BRENNAN HAND DELIVERY

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STATEMENT

NATURE OF THE APPEAL

This appeal arises from an order and decision of the United States District Court for the Western District of New York (Hon. Harold P. Burke, U.S.D.J.) which was entered on July 12, 1977. That order denied the appellant-National Association of Letter Carriers' motion for leave to intervene as a plaintiff with full-party status in the instant government enforcement action commenced by the United States Postal Service. At issue in this appeal is whether the District Court exercised its discretion properly in denying the appellant's motion for intervention.

NATURE OF THE PROCEEDINGS

On February 24, 1977, a federal statutory enforcement action was commenced by the United States Attorney for the Western District of New York, on behalf of the United States Postal Service, against Patricia H. Brennan and J. Paul Brennan doing business as P.H. Brennan Hand Delivery (hereinafter "the Brennans").

Since March of 1976, the Brennans have been actively involved in the operation of P.H. Brennan Hand Delivery, a delivery service which conducts business solely in the downtown Rochester, New York area. P.H. Brennan Hand Delivery presently serves a growing portion of the Rochester business and legal

communities, providing guaranteed same-day delivery of all materials carried at rates which are appreciably lower than those currently charged by the Postal Service.

The plaintiff United States Postal Service is a quasi-public corporation which was established by the Postal Reorganization Act of 1970, 39 U.S.C. §101 et seq., 84 Stat. 179 (1970), to replace the former United States Post Office. The Postal Service is expressly authorized by statute to sue and be sued in its official name, and to settle and compromise claims by or against it. 39 U.S.C. §401. The Department of Justice is directed, pursuant to 39 U.S.C. §409(d), to furnish the Postal Service with such legal representation as it may require.

The gravamen of the Postal Service's complaint is that the Brennans have, since March of 1976, and are presently operating a business in Rochester, New York which involves the private carriage and delivery of "letters"¹ for compensation, and that that business allegedly violates certain acts of Congress which are commonly and collectively known as the

1 The term "letter" is not defined by statute but by regulations promulgated by the Postal Service. Accordingly, the Postal Service's monopoly over letter mail is as wide or narrow as the definition it chooses to adopt. The current definition of letter is found at 39 C.F.R. §601(a): "Letter" is a message directed to a specific person or address and recorded in or on a tangible object..."

Private Express Statutes (39 U.S.C. §§601-606; 18 U.S.C. §§1693-1699). 39 U.S.C. §601, a civil statute, establishes a method by which a letter may be "lawfully" carried outside of the government mail and 18 U.S.C. §1696, a criminal statute, makes unlawful (and punishable) any other method of carrying letters outside the Postal Service mails.

In essence, the Private Express Statutes purport to forbid the existence of all private competition with the Postal Service in just one particular area of its operations: the carriage and delivery of letter mail. In fact, however, keen letter-carrying competition which has a substantial and well-documented impact upon postal revenues exists in a number of select areas in which the Postal Service has either carved out regulatory exceptions or exemptions, see e.g. 39 C.F.R. §§310.1 and 310.3, or has chosen to completely suspend operation of the monopoly. See 39 U.S.C. 601(b)² and 39 C.F.R. Part 320.

The only express statutory sanctions for violation of the Private Express Statutes are authorized by and set forth in the criminal component of the Statutes, at 18 U.S.C. §1696:

(a) Whoever establishes any private express for the conveyance of letters or

2 39 U.S.C. §601(b) provides: "The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension."

packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any postal route which is or may be established by law, or from any city, town or place to any other city, town or place, between which the mail is regularly carried, shall be fined not more than \$500 or imprisoned not more than 6 months, or both.

In the present action the Postal Service and the United States Attorney have chosen to seek, in the exercise of their enforcement discretion, equitable relief in the form of a permanent injunction which would enjoin the Brennans from accepting, carrying or delivering letters, unless such activity was conducted in accordance with provisions of the Private Express Statutes and certain Postal Service regulations.
(A.9).³

Issue was joined by service of an answer on behalf of the Brennans on March 2, 1977. The answer admits the major factual allegations in the Postal Service's complaint, as there is no dispute that P.H. Brennan Hand Delivery's four messengers travel regularly on city streets and sidewalks which are also used by Postal Service employees, and that at least some of the materials which are carried by the messengers arguably fall within the current Postal Service definition of "letter mail".

3 "A" references are to the record on appeal printed in the parties' joint index.

Following those admissions, however, the answer sets forth several legal defenses which are based upon Article I and Amendments 5 and 10 of the Constitution of the United States. Thus, the issue in the case is not whether the existence of private competition would diminish Postal Service revenues and possibly jeopardize postal employee job benefits and opportunities, or even whether the Private Express Statutes have been technically violated. Rather, the sole issue is whether the Private Express Statutes, which purport to grant a federal governmental monopoly to the United States Postal Service for the carriage and delivery of all letter mail, are unconstitutional as enacted and as implemented against P.H. Brennan Hand Delivery.

On April 13, 1977, defendants' counsel was served with a notice of motion to intervene, an affidavit and a proposed complaint by the National Association of Letter Carriers (hereinafter referred to as "NALC" or the "Union"). The NALC is a national labor organization which is presently recognized as the certified, exclusive bargaining agent of approximately 200,000 city letter carriers employed by the Postal Service. As the letter carriers' bargaining representative, the NALC negotiates collective bargaining agreements which constitute contractual manifestations of its members'

employment rights and responsibilities. The Union may also sue in its own name and on behalf of its members to enforce those collective bargaining agreements. 39 U.S.C. §1208(c).

Pursuant to its application to intervene, based upon Rule 24 of the Federal Rules of Civil Procedure, the NALC seeks admission to the present action as a full-fledged party plaintiff, on its own behalf and on behalf of its members as a class. In seeking to intervene, the Union does not seek to enforce a collective bargaining agreement, but seeks to prosecute a claim for violation of the Private Express Statutes, to protect the contingent economic expectations of the employees it represents.

The Union's proposed claim in intervention sets forth the same jurisdictional bases which are asserted in the government's complaint. It sets forth the same factual allegations. It alleges the same statutory violation, including a specific allegation that the defendants' conduct constitutes a violation of the criminal component of the Private Express Statutes. (A. 30) And, the Union prays for the same permanent injunctive relief. The only, but by no means insignificant, differences between the government's claim and the Union's proposed claim are: (1) that the NALC also attempts to create a class action (A. 29), and (2) that the Union seeks preliminary as well as permanent injunctive relief. (A. 30)

On May 23, 1977, oral arguments on the Union's motion to intervene were presented before Hon. Harold P. Burke, Judge of the United States District Court for the Western District of New York. Legal briefs were thereafter presented to the Court and the motion was deemed submitted on June 6, 1977. By an order and decision dated July 12, 1977, the Court denied the Union's motion to intervene:

ORDERED, that the motion to intervene is denied on the ground that the applicant has no standing to assert its proposed claim, and upon the ground that the applicant has failed to establish that it is entitled to intervene, either as a right or with the authorization of the court. (A. 39)

On June 15, 1977, the Postal Service filed a notice of motion for summary judgment which was originally returnable before Judge Burke on June 27, 1977. In a letter accompanying the government's motion papers, Assistant United States Attorney Gerald J. Houlihan stated: "As I advised you, we are quite anxious to have this matter submitted for decision so that it can be resolved as soon as possible." Following an adjournment of the government's motion until July 11, 1977, the defendants filed a cross-notice of motion for summary judgment which was also returnable on July 11, 1977. Thereafter, pursuant to a request by the defendants, the cross-motions for summary judgment were adjourned until July 25, 1977, when

initial briefs were exchanged between the parties and submitted to the Court. As of August 8, 1977, when reply briefs were exchanged and served upon the Court by the Postal Service and P.H. Brennan Hand Delivery, the cross-motions for summary judgment were deemed submitted to the District Court for decision. The parties are presently awaiting a decision from the District Court on the motions for summary judgment.

Also on August 8, 1977, the Union's notice of appeal from the denial of intervention was filed with the Clerk of the District Court in Buffalo, New York. At no time between July 12, 1977 and August 8, 1977 did the Union seek to stay the proceedings pending its appeal, in spite of the fact that at least its Rochester counsel was fully aware that both of the primary parties had moved for final judgment. Notwithstanding such conspicuous and unexplained inactivity, the NALC now asks this Court to reverse the denial of intervention and "speedily grant" its intervention in the action. (Appellant's Brief at 28).

ARGUMENT

POINT I

THE LOWER COURT PROPERLY FOUND THAT THE UNION DOES NOT HAVE STANDING TO ASSERT ITS PROPOSED CLAIM BY WAY OF INTERVENTION.

- A. Standing Is Relevant To An Application For Intervention Where The Applicant Seeks Full Party Status As A Plaintiff To Prosecute A Claim.

Through the guise of a motion to intervene, made pursuant to Rule 24 of the Federal Rules of Civil Procedure, the National Association of Letter Carriers has sought to obtain full-party status as a plaintiff in the instant government enforcement action. It has not sought to join the action as a defendant, see New York Public Interest Research Group v. Regents of the University of the State of New York, 516 F.2d 350 (2nd Cir. 1975), Associated Third Class Mail Users v. United States Postal Service, No. 76-1768 (D.D.C. January 5, 1977), and United States v. Board of School Commissioners of the City of Indianapolis, 466 F.2d 573 (7th Cir. 1972), cert. denied 410 U.S. 909 (1973). Nor has the NALC sought a supplementary, qualified or limited role in the litigation, see Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972), Hodgson v. United Mine Workers of America, 473 F.2d 118 (D.C. Cir. 1972) and United States v. Simmonds Precision

Products, Inc., 319 F.Supp. 620 (S.D.N.Y. 1970). Rather, the Union insists that it is entitled to intervene as a co-plaintiff, on equal footing with the United States Attorney and the United States Postal Service, to prosecute a claim to enforce the Private Express Statutes and to seek greater relief than the government has requested.

The union has suggested that "standing has no bearing on the disposition of a request for intervention under Rule 24(a)" (Appellant's Brief at 9), and that standing is not a requirement for intervention because of the difference theorized by one commentator between "initiation" and "intervention".⁴ In response to that argument, it is the firm contention of the defendants that at least in cases where an applicant for intervention is seeking to obtain and exercise all litigation rights which are normally associated with the initiator of litigation, it is neither unusual, nor improper, nor antithetical to the concept of intervention, for a court to examine the applicant's standing to intervene and assert its proposed claim. That is because Rule 24 intervention in such instances presupposes the existence of a claim which belongs to the applicant and not to an existing party, and that the applicant has a right to maintain a claim for the relief sought.

4 See, Shapiro, "Some Thoughts in Intervention before Courts, Agencies, and Arbitrators," 81 Harv. L. Rev. 721 (1968).

In Warth v. Seldin, 495 F.2d 1187 (2nd Cir. 1974), aff'd 422 U.S. 490 (1975), this Court dealt with the standing of a proposed intervenor to join an action as a plaintiff. In that case, a nonprofit trade association, the Rochester Homebuilders Association, Inc., sought to intervene pursuant to Rule 24(b) in a class action brought by various organizations and individuals resident in the Rochester, New York metropolitan area to challenge the constitutionality of a zoning ordinance of a Rochester suburb. The District Court (Hon. Harold P. Burke, U.S.D.J.) denied the association's motion on the grounds that the association lacked standing and that its intervention would create undue delay and prejudice. This Court (per Hays, J.) affirmed the lower court's decision regarding intervention:

We agree that the association lacked standing and do not reach the Rule 24(b) issue. 495 F.2d at 1194-1195.

Similarly, the Supreme Court (per Powell, J.) analyzed the Home Builders' appeal of the denial of intervention solely in terms of standing. 422 U.S. at 514-516.

Also instructive in this regard is Solien v. Miscellaneous Drivers and Helpers Local 610, 440 F.2d 124, 132 (8th Cir. 1971), cert. denied 403 U.S. 905 (1971) where a charging party in an unfair labor practice complaint before the

National Labor Relations Board sought intervention with full party status pursuant to Rule 24(a)(2). The applicant was denied full party status and the right to intervene in a proceeding for preliminary injunctive relief which, according to statute and the court's analysis, only the Board's Regional Director was authorized to initiate. The court found that since the applicant for intervention had no right to maintain a claim for the relief sought, it could not seek to prosecute its claim by attempting to obtain full party status indirectly through intervention. Admittedly, the applicant in Solien did have full party status in the main unfair labor practice proceeding before the Board pursuant to an explicit statutory grant, but that fact is of no relevance to the present case, in which the NALC has presented no statutory right to be accorded full party status at any stage of the litigation.

For other cases in which courts have decided that an applicant did not have "standing to intervene" because the interest sought to be asserted was not based upon a right which belonged to the proposed intervenor rather than to an existing party, see: In re Penn Central Commerical Paper Litigation, 62 F.R.D. 341, 346 (S.D.N.Y. 1974), aff'd 515 F.2d 505 (2nd Cir. 1975), Donson Stores, Inc. v. American Bakeries Company, 58 F.R.D. 481, 483 (S.D.N.Y. 1973), and Arvida Corporation v. City of Boca Raton, 59 F.R.D. 316, 320-322 (S.D. Fla. 1973).

B. The Private Express Statutes Provide No Private Right of Action Which Allows Enforcement Actions To Be Prosecuted by Private Parties.

The question of whether a party in the position of the NALC has standing to enforce the Private Express Statutes to protect the economic interests of its members is not a new one to the federal courts. In a recent and very similar case, it was held that a postal union which sought to enforce the Private Express Statutes did not have standing to commence a private action to prosecute such a claim.⁵ American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America, Inc., 349 F.Supp. 1297 (E.D. Mich. 1972), aff'd 481 F.2d. 90 (6th Cir. 1973), cert. granted 414 U.S. 1110 (1973), cert. dismissed 415 U.S. 901 (1974).

As in the instant case (A. 30), the APWA claimed that the defendants violated the criminal sanctions of the Private Express Statutes. Also, as in the instant case, the postal workers union sought temporary and permanent injunctive relief. And, as in the instant case, the APWA relied upon certain sections of the Postal Reorganization Act indicating concern with the economic well-being of postal employees as the basis

⁵ See also, Williams v. Wells Fargo & Co. Express, 177 F. 352 (8th Cir. 1910), where an informer was not permitted to prosecute a private "qui tam" action to recover penalties for the alleged violation of the Private Express Statutes.

for its right to initiate the enforcement action. In affirming a grant of summary judgment against the union, based upon lack of standing, the Sixth Circuit stated at 481 F.2d page 93:

More fundamentally, perhaps, although appellants [the union] have directed little attention to this point, a serious question exists as to whether either 18 U.S.C. §1696 or 39 U.S.C. §601 or both provide a basis for private right of action. Section 1696 is a criminal statute, and the general rule is that a private right of action is not maintainable under a criminal statute. 'Equally important is the firmly established principle that criminal statutes can only be enforced by the proper authorities of the United States Government and a private party has no right to enforce these sanctions.' Bass Anglers Sportman's Society of America v. United States Steel, 324 F.Supp 412, 415 (N.D. Ala. 1970), aff'd 447 F.2d 1304 (5th Cir. 1971). 'The reasons for placing exclusive enforcement of criminal statutes in the proper governmental officials are even more applicable to enforcement of such statutes by injunction.' 324 F.Supp. at 416. (Emphasis added).

In its decision, the Sixth Circuit further stated that while private parties have been allowed to enforce federal criminal statutes in certain limited instances, the plaintiffs in such cases have been "without exception clearly members of the public designed to be protected by the applicable statute." 481 F.2d at page 93. The Court found no evidence that the Private Express Statutes authorized private enforcement actions or that the statutes were enacted for the protection of a class

which included the postal employees or a union representing them.

The assertion by the Union (Appellant's Brief at 15) that the American Postal Workers Union case is distinguishable from the present case and from the case upon which the Union places its heaviest reliance, National Association of Letter Carriers v. Independent Postal Service of America, Inc., 336 F.Supp. 804 (W.D. Okla. 1971) aff'd, 470 F.2d 265 (10th Cir. 1972), on the basis that the APWU sought to bring its action under a criminal statute, 18 U.S.C. §1696, whereas the NALC has sought to bring a "civil action", is untenable. As the Sixth Circuit opinion in the American Postal Workers Union case properly recognized, whenever any party seeks to enforce the Private Express Statutes, that party is, necessarily, seeking to enforce what is essentially a criminal statute. 481 F.2d at 93. Accordingly, the Sixth Circuit's admonitions regarding the availability of private rights of action to enforce federal criminal statutes are applicable in all cases in which a party seeks to enforce the Private Express Statutes.

In the instant case, the NALC has not based its right to prosecute a claim under the Private Express Statutes on a violation to the Constitution, or violation of a common law right, or an adverse administrative decision. Because an

adverse administrative determination is not involved, the "zone of interest" standing test promulgated in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) is inapplicable and was wrongly relied upon in the court's analysis of standing in NALC v. IPSA, supra. American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal Systems of America, Inc., supra, 481 F.2d at 92, and Solien v. Miscellaneous Drivers and Helpers Union, supra, 440 F.2d at 132. It is also arguable that Sierra Club v. Morton, 405 U.S. 727 (1972) is inapplicable, for that case dealt with standing for "...persons who claim injury of a noneconomic nature to interests that are widely shared", 405 U.S. at 734, and further states that the "personal stake in the outcome" test for standing is applicable "where the party does not rely on any specific statutes authorizing invocation of the judicial process..." 405 U.S. at 732.

However, even if this Court determines that the Data Processing and Sierra Club tests are relevant to the question of standing in the present case, neither test is met because the NALC has neither alleged nor shown actual, particularized, demonstrable injury in fact, economic or otherwise, to either itself or to any of its members. In fact, the Union has not even alleged that any of its members work in Rochester, New York.

What the NALC has based its right to prosecute its claim upon is an implied right of private action which it believes is provided by the Postal Laws in general or by the Private Express Statutes in particular. However, the NALC has failed completely to refer in its moving papers to any statutory section, regulatory measure or legislative history of either the Postal Reorganization Act or the Private Express Statutes which grants to a bargaining representative of the postal workers, or the workers themselves, any right or authority to assume the role of a "private attorney general" for purposes of enforcing the Private Express Statutes. The reason for the absence of such a showing is abundantly clear; no such section or measure or legislative history exists.

Nor is that conclusion altered in any way by the Union's suggestion (Appellant's Brief at 15) that 39 U.S.C. §1208(c) may provide the basis for an implied private right of action to enforce the Private Express Statutes. Although the Tenth Circuit, in NALC v. IPSA, 470 F.2d at 269, relied upon that section in deciding that the NALC could commence an action under the Private Express Statutes to protect the employment interests of its members, a fair reading of 39 U.S.C. §1208(c), in the statutory context in which it actually appears, reveals that it clearly applies only to suits commenced by a labor

representative of postal employees to enforce collective bargaining agreements.

C. Only the Postal Service (With Assistance From The Department of Justice) Has The Authority To Enforce The Private Express Statutes.

Only the United States Postal Service is the purported recipient of monopoly mail powers and only the United States Postal Service (with assistance from the Department of Justice) has the right and authority to enforce that supposed monopoly. Pursuant to §409(d) of the Postal Reorganization Act, 39 U.S.C. §101 et seq. (1970), the Department of Justice is directed to furnish legal representation in suits by and against the Postal Service. That section states:

The Department of Justice shall furnish, under §411 of this title, the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General, the Postal Service may employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service or its officers or employees in matters affecting the Postal Service.

Further, 28 U.S.C. §516 provides as follows:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

In addition, only the Postal Service (with assistance from the Department of Justice) should have the right and

authority to prosecute claims to enforce the Private Express Statutes, because it is the Postal Service alone which also has the power and authority to determine the parameters of its alleged monopoly.

More specifically, the Postal Service has the discretionary power and authority, pursuant to the Private Express Statutes and the regulations implementing those Statutes, to end its monopoly and allow competition if it so chooses. See, 39 U.S.C. 601(b) and 39 C.F.R. §310.2(c) (1976). In addition, only the Postal Service has the right and authority to define by regulation the operative meaning of the word "letter." 39 C.F.R. §310.1. And, only the Postal Service is arguably given statutory authority to suspend portions or all of the Private Express Statutes. 39 U.S. §601(b) and 39 C.F.R. Part 320. Theoretically, then, the Postal Service has the power and could exercise its discretion at any time, in the public interest, to decide that it will begin to allow private competition with the government's delivery service, and the NALC would not be able to challenge such a decision, despite the fact that such a decision might very well have some impact upon the security of its members' jobs.

In sum, to allow parties other than the United States Postal Service or the United States Attorney to seek to enforce

the Private Express Statutes would be to directly undermine the discretionary power of the Postal Service in both exercising and enforcing its purported monopoly powers. This important factor was recognized in American Postal Workers Union v. Independent Postal System of America, Inc., supra, where the district court stated:

Thus, enforcement of criminal provisions, as well as methods and programs calculated to promote efficient operation of the postal service, is left to the department. To permit private actions such as this would thwart that Congressional purpose and perhaps undermine even the efforts of Congress to protect postal employees. Certainly only confusion could result from disparate determinations by different district courts as to types of material coming within the purview of a certain regulation. 349 F. Supp. at 1297.

Such considerations also moved the American Postal Workers Union court to acknowledge, but refuse to follow, the rationale or holding of the case given greatest emphasis by the appellant, National Association of Letter Carriers v. Independent Postal System of America, Inc., 336 F.Supp. 804 (W.D. Okla. 1971), aff'd 470 F.2d 265 (10th Cir. 1972).

As the Union herein has no authority or standing to commence or prosecute an action alleging criminal violation of the Private Express Statutes, the NALC should not be allowed to prosecute a claim indirectly (by intervention) that it would be

prohibited from prosecuting directly. The Postal Service alone, and not its employees or their union, is the purported grantee of the monopoly powers provided for in the Private Express Statutes. Similarly, only the Postal Service (with assistance from the Department of Justice) should be and is allowed to prosecute enforcement actions to maintain those powers. Accordingly, the lower court ruled properly in finding that the Union is without standing to assert its proposed claim through intervention.

POINT II

THE UNION'S MOTION TO INTERVENE
WAS PROPERLY DENIED BECAUSE IT
FAILED TO COMPORT WITH THE SUB-
STANTIVE REQUIREMENTS OF RULE
24 OF THE FEDERAL RULES OF
CIVIL PROCEDURE.

A. The Union Did Not Establish That It Was Entitled
to Intervene As Of Right.

Although the defendants believe strongly that the Union's lack of standing to intervene as a party plaintiff should be dispositive in this Court's examination of the decision and order entered below, the defendants also submit that the District Court properly determined that the NALC failed to establish any right to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

Intervention of right is allowed in two instances under the Federal Rules of Civil Procedure. The first instance, which is set forth at Rule 24(a)(1), is when a statute of the United States confers an unconditional right to intervene. This section was not relied upon the appellant below; in fact, the Union conceded at oral argument that there is no federal statute which confers upon it an unconditional right to intervene. The absence of an absolute statutory right to intervene in the present case is clearly distinguishable from the situation in Brotherhood of Railroad Trainmen v. Baltimore and O. R. Co., 331 U.S. 519 (1947)(see reference in Appellant's Brief at 1-2), where the decision to approve intervention was made solely on the basis of the existence of an absolute statutory right to intervene. 331 U.S. at 531.

Intervention of right may also be allowed pursuant to Rule 24(a)(2), which requires that the applicant, at a minimum, be able to meet a four-pronged test. See, 32 J. Moore, Federal Civil Practice, ¶24.09[1] (1977), Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 504 (3rd Cir. 1976), cert. denied 426 U.S. 929 (1976), Stockton v. United States, 493 F.2d 1021 (9th Cir. 1974), Ionian Shipping Company v. British Law Insurance Company, 426 F.2d 186, 189 (2nd. Cir. 1970) and Edmondson v. State of Nebraska, 383 F.2d 123, 126 (8th Cir. 1967). In

meeting that test, an applicant for intervention must show: (1) that the motion to intervene is timely; (2) that the applicant has a legally protectible interest relating to the property or transaction which is subject to the primary action; (3) that the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, and (4) that the applicant's interest is not adequately represented by the existing parties.

1. Timeliness.

In the context of the instant litigation, the timeliness of the Union's motion to intervene has not been challenged by the defendants.

2. The Union failed to allege and establish a direct substantial, legally protectible interest which would entitle it to intervene as of right.

In order to meet its burden of showing that it is entitled to intervene as a matter of right, see Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972), the Union is required to show that it has a direct, substantial, and legally protectible interest relating to the subject matter of the primary action. See Donaldson v. United States, 400 U.S. 517, 531 (1971), Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir. 1970) cert. denied sub. nom. Trefina, A.G. v. United States, 400 U.S. 878 (1970), reh. denied 400 U.S.

1025 (1971), and In re Penn Central Litigation, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), aff'd 515 F.2d 505 (2nd Cir. 1975). In Nuesse v. Camp, 385 F.2d 694, 699 (D.C. Cir. 1967), the required interest was referred to as a "litigable" interest. In vivid contrast with the types of direct, substantial and legally protectible interests which may entitle an applicant to intervention as a right, the NALC proposes to protect only the economic "expectations" of its members who may be threatened with the loss of job opportunities, overtime and annuities if the defendants are allowed to compete against their present employer. (A. 23-24, 27)

Even if one assumes, arguendo, that such economic expectations are more than contingent, derivative, vicarious or dependent interests, there is clearly no correlation between the assertion of those rights and a finding that the Private Express Statutes constitute an excessive and unconstitutional exercise of Congressional power. If the Private Express Statutes are indeed unconstitutional, the subsequent possible diminution of Postal Service revenues and loss of postal employee jobs would not result from "unlawful" incursions by the defendants, but from a judicial decision that the federal laws are invalid.

Finally, neither of the cases cited by the appellant (Appellant's Brief at 18-19) for the bald proposition that

"...judicial precedent establishes the broader proposition that a union has a right to intervene in any proceeding involving the employer of its members where the end result of that proceeding could be the impairment of job opportunities for its members and the economic strength of the Union" can even liberally be read to stand for such an open-ended principle. In United States v. Simmonds Precision Products, Inc., 319 F.Supp. 620 (S.D.N.Y. 1970), a union was allowed limited intervention in a government antitrust action for the purpose of opposing the proposed entry of a final consent decree. That case, which includes mention of only one of the several criteria which are necessary for intervention of right, certainly does not stand for the proposition that any Union can, in any proceeding, automatically intervene to protect job security. Likewise, the court in General Electric Company v. Bootz Manufacturing Company, Inc., 289 F.Supp. 504 (S.D. Ind. 1968), found that a union was entitled to intervene where the only parties in the action were purely nominal adversaries who were attempting to collusively and fraudulently use the process of a court to transport property through picket lines.

3. The Union Cannot Meet the "Impairment" Requirement of Rule 24(a)(2) If It Does Not Have A Legally Protectible Interest to Assert.

There is, necessarily, a close relationship between the existence of a legally protectible interest by an applicant for intervention and that applicant's ability to protect that interest. See 7A Wright & Miller, Federal Practice and Procedure, §1908 at p. 495 (1972) and Hobson v. Hansen, 44 F.R.D. 18, 30 (D.D.C. 1968). In the present case, the Union relies upon the argument that the necessary practical disadvantage which may as a practical matter impair or impede its ability to protect its interests is supplied by the "possible stare decisis of an adverse decision". (Appellant's Brief at 21). That argument, in turn, logically presupposes: (1) the existence of an otherwise substantial and legally protectible interest, which satisfies the first requirement of Rule 24(a)(2), and (2) the ability of the applicant to protect that interest in an independent action, if it so chooses.

The inquiry, therefore, inevitably returns to consideration of standing and interest, for the Union's ability to protect its interest cannot be impaired or lost entirely by the stare decisis effect of an adverse ruling unless the Union also has the ability to commence an independent enforcement proceeding in which the stare decisis impact of an adverse ruling

would be felt. It is noteworthy that in each of the cases cited by the appellant in support of its impairment argument, the applicant for intervention would, in each instance, have been able to commence a proceeding of its own to assert its claimed interest, but is allowed to intervene because of the practical impact a decision in the existing case would have upon the applicant's subsequent action. In the present case, where the Union does not have the authority to commence an action of its own to prosecute the Private Express Statutes, there is no possibility of its being subjected to the stare decisis impact or effect of an adverse ruling in a subsequent action.

4. The Union Failed to Establish or Even Allege That Any Interest It Has in the Present Case is Not Adequately Represented by the Existing Plaintiff.

Even if all of the requirements of Federal Rule 24(a)(2) are met, intervention of right may not be allowed unless an applicant has met its burden, however minimal, see Trbovich v. United Mine Workers of America, supra, 404 U.S. at 538 n.10, of showing that its interests are not adequately represented by the existing parties. In the present case, the Union's motion papers are completely void of any allegations or evidence that the United States Attorney and the United States

Postal Service have failed to or are incapable of adequately representing whatever vicarious interests the NALC and its members might have in the litigation. To the contrary, the Union acknowledges that the action was brought at its behest (Appellant's Brief at 24) and that it conceded in the court below that its interests are adequately represented, at least in a general sense, by the existing plaintiff. (Appellant's Brief at 24). For these reasons alone, the Union's motion to intervene as a matter of right was properly denied.

The inadequacy of the Union's position is further emphasized when one considers that in the absence of special circumstances, the federal government is generally accorded a presumption that its advocacy is adequate in government enforcement actions. 7A Wright & Miller, Federal Practice and Procedure, §1909 at 530-531 (1972) and Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3rd Cir., 1976), cert. denied 426 U.S. 929 (1976). Moreover, where the applicant is merely seeking to assert the same basic position as one who is already a party, as is the case here, it is incumbent upon the applicant to establish: (1) the existence of collusion between its representatives and an opposing party, see e.g. General Electric Company v. Bootz Manufacturing Co., supra; (2) or that its representative has or represents an

interest which is adverse to that of the proposed intervenor, or (3) that the representative has failed in the fulfillment of his duties as an advocate. See Stadin v. Union Electric Co, 309 F.2d 912, 919 (8th Cir. 1962), cert. denied 373 U.S. 915 (1963), United States v. Board of School Commissions of the City of Indianapolis, supra, 466 F.2d at 575 and United States v. International Business Machines Corp., 62 F.R.D. 530, 537 (S.D.N.Y., 1974).

As mentioned previously, the issue being litigated in this case is not whether the Private Express Statutes have been violated, but whether the Private Express Statutes are constitutional. If those statutes are found unconstitutional, their usefulness as the basis of protecting workers' job security vanishes. Within the context in which the present case is found, the task of defending the constitutionality of a federal statute is unquestionably within the special province of the United States Department of Justice and the agency which is the purported recipient of a constitutionally manifested power.

The Postal Service has exhibited great concern in the lower court over the seriousness of the challenge with which it is faced, and has indicated its willingness, on the record, to pursue the litigation as far as the Supreme Court. Contrary to the suggestion of the appellant, and to be distinguished from

the statutory mandate imposed upon the Secretary of Labor in Trbovich to represent the public interest and the interests of Union members, the United States Attorney is not obligated to serve a dual function in prosecuting the instant action on behalf of the Postal Service. His concern is solely that of defending the constitutionality of the statute which has been challenged. It borders on the incredulous, given such a situation, to suggest that the United States Attorney is incapable of representing the economic and non-economic interests of the agency (within which any economic interest of the appellant is subsumed) which he is required to represent by statute. There can be no question, and the NALC has not challenged the fact, that the Postal Service has been well and vigorously represented by the United States Attorney's Office.

In sum, there is a complete absence of any compelling statement or concrete showing in the Union's papers which establishes that its interests are not adequately represented by the very public officer who is officially charged with the responsibility of defending the constitutionality of the Private Express Statutes. Accordingly, the District Court, which "is entitled is the full range of reasonable discretion in determining whether [the] requirements [of Rule 24(a)(2)] have been met", Rios v. Enterprise Association Steamfitters

Local Union #638, 520 F.2d 352, 355 (2nd Cir. 1975), properly exercised its discretion in finding that the NALC had not established that it was entitled to intervene as of right.

B. The District Court Properly Denied The Union's Application for Permissive Intervention.

Federal Rule 24(b) provides that, upon timely application, intervention may be "permitted" at the District Court's discretion in two situations: (1) when a statute of the United States confers a conditional right to intervene, or (2) when an applicant's claim or defense in the main action have a question of law or fact in common. It is also well established that permissive intervention will not be allowed in in personam actions unless the applicant alleges an independent basis for the assumption of jurisdiction. See, 3B J. Moore, Federal Practice, 24.18[1] at 24-752 (1977), Blake v. Pallan, 554 F.2d 947, 955 (9th Cir. 1976) and Pierson v. United States, 71 F.R.D. 75, 81 (D.C. Del. 1976). Accord, 7A Wright and Miller, §1917 at 590-595 (1972).

By definition, an application for permissive intervention is addressed to the sound discretion of the District Court. Guidance for the exercise of judicial discretion is provided in Rule 24(b), which states in pertinent part:

In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice adjudication of the rights of the original parties.

In the instant case, delay and/or prejudice would be certain to arise from at least four different sources if intervention is permitted. First, insofar as the Union seeks to obtain preliminary injunctive relief, great amounts of unnecessary and wasteful time, effort and expense would be spent litigating the factual issues surrounding the Union's allegations of "irreparable harm." The prejudicial impact of such an inquiry is underscored when one considers that the question of "irreparable harm" to postal employees has no bearing whatsoever upon the constitutionality of the Private Express Statutes. Second, if intervention is permitted and the Union is allowed to seek preliminary injunctive relief, which the United States Attorney has already decided not to seek, the potential prejudicial impact upon the defendants is obvious. Third, severe prejudice and delay would be certain to result if the Union was allowed to intervene and then moved to amend its complaint to assert other actionable causes which, however erroneous and unfounded, it apparently believes it has the right to bring against the defendants. (See Appellant's Brief at pp. 27-28). And fourth, the prospect of undue delay and prejudice is clearly apparent when one is reminded that the parties have already sought final judgment, and that the NALC took no steps to stay the proceedings pending their appeal.

Federal cases which have dealt with permissive intervention have established that undue delay or prejudice, while certainly of key importance, are not the only factors to consider when deciding whether to allow permissive intervention. Tachna v. Insuranshares Corp. of Delaware, 25 F. Supp. 541 (D.C. Mass. 1939). One factor which has been cited in denying intervention is that the intervenor's claim presents collateral or extrinsic issues. City of Rockford v. Secretary of Housing and Urban Development, 69 F.R.D. 363 (N.D. Ill. 1975). In the instant case, the intervenor's prayer for preliminary injunctive relief presents potential issues which are not only collateral or extrinsic in nature, but indeed irrelevant to the legal issues which lie at the heart of the litigation.

Still another important factor which the District Court may consider is whether the applicant for intervention proposes to set forth a claim or defense which is different than or merely duplicative or repetitious of the claims or defenses presented in the main action. The better view is that where the applicant presents no new issues or questions, especially in government enforcement actions, there may be less onerous and less obstructive but equally effective means for the presentation of that applicant's views to the Court. Shapiro, supra, 81 Harv. L. Rev. 721, 752-753 (1968).

Normally, such contributions may be made just as effectively and certainly more expeditiously by the assumption of an amicus curiae role. See British Airways Board v. The Port Authority of New York and New Jersey, 71 F.R.D. 583 (S.D.N.Y. 1976) and National Labor Relations Board v. Swift and Company, 130 F. Supp. 214 (E.D. Mo. 1955), mod. 233 F.2d 226 (8th Cir. 1956).

In a widely cited judicial opinion which addressed the same question, Crosby Steam Gauge and Valve Company v. Manning, Maxwell and Moore, Inc., 51 F.Supp. 972, 973 (D.C. Mass. 1943), Judge Wyzanski made a statement which has particular relevance to the present litigation:

"It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions, and the like which tend to make the proceeding a Donnybrook Affair. Where he presents no new questions, a third party can contribute usually most effectively and always expeditiously by a brief amicus curiae and not by intervention."

This statement appears especially apposite in the instant case, where the issues are purely issues of law and where the Union presents no new claims but merely repeats the claims already presented by the Postal Service. There is absolutely no reason why the views and arguments of the NALC

with regard to the merits of the action could not be effectively brought to the attention of the court, at any stage of the litigation, through an amicus curiae brief.

In sum, the appellant has elucidated no facts which show the specific manner in which the District Court's failure to grant permissive intervention constitutes a "classic case of abuse of discretion." It has not alleged any independent bases of jurisdiction. It has provided this Court with no judicial authority which supports the reversal of the District Court's exercise of discretion with respect to this applicant, under the facts of this case. The defendants, on the other hand, have enumerated several ways in which the grant of permissive intervention would severely delay and prejudice an expeditious and equitable adjudication of their asserted rights. The defendants have also shown that permissive intervention in the instant case is not needed to avoid a multiplicity of actions, and would in no way aid in the efficient administration of justice. Contrary to the implorations of the Union, the District Court's denial of permissive intervention constituted a wise, just and clearly supportable use of judicial discretion which should not be overturned.

CONCLUSION

The NALC did not establish that it is entitled to prosecute a private action to enforce the Private Express

statutes. It should therefore not be allowed to accomplish indirectly (through intervention) what it cannot do directly. Similarly, the Union failed to establish, by failing to comply with the substantive requirements of Federal Rule 24, that it is entitled to intervene as of right or that it should have been permitted to intervene with the District Court's permission. Accordingly, the District Court's denial of the Union's motion to intervene constituted neither an abuse of discretion nor an erroneous view of law, and should be affirmed in all respects.

Respectfully submitted,

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

November 21, 1977

Re: United States Postal Service vs. National Association of
Letter Carriers vs. Patricia Brennan, et. al.

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record
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That at the request of

James Hartman, Esq.

Attorney(s) for
Defendants-Appellees
On November 21, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

MOZART G. RATNER, P.C.
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Washington, D.C. 20036

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Notary Public

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